

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**GREGORIO BUSTILLOS**  
Claimant

VS.

**FARMLAND NAT'L BEEF PACKING CO.**  
Respondent

AND

**ZURICH AMERICAN INSURANCE CO.**  
Insurance Carrier

Docket No. **1,034,587**

**ORDER**

Claimant requests review of the July 16, 2008 preliminary hearing Order for Medical Treatment entered by Administrative Law Judge Pamela J. Fuller.

**ISSUES**

At the July 11, 2008, preliminary hearing the claimant sought an order authorizing the recommended bilateral rotator cuff surgery and also sought a change of physician to perform the surgery. Respondent denied that the bilateral rotator cuff tears were caused by claimant's work with respondent.

The Administrative Law Judge (ALJ) ordered respondent to pay for claimant's medical treatment as recommended by Dr. Suhail Ansari. But the ALJ denied claimant's request for a change of treating physician and a list of three physicians to choose from.

Claimant requests review of whether the ALJ erred in denying the change of treating physician and/or providing a list of three alternate treating physicians to provide the recommended medical treatment.

In the respondent's brief, it argues the Board does not have jurisdiction to review the issue raised by the claimant. In the alternative, it argues the medical evidence supports the ALJ's determination and should be affirmed.

The only issue raised before the Board was whether ALJ exceeded her jurisdiction denying claimant's request to change the authorized treating physician.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The claimant had been provided medical treatment with Dr. Suhail Ansari for his work-related injuries. Treatment included claimant's bilateral shoulder complaints which were diagnosed as rotator cuff tendonitis. Dr. Ansari released claimant from treatment on February 17, 2007, but told him to return if his shoulder pain worsened. A preliminary hearing was conducted on January 11, 2008, and the ALJ ordered Dr. Ansari to proceed with an MRI of claimant's shoulders. The MRI revealed a large rotator cuff tear in claimant's right shoulder and a small tear in claimant's left shoulder. Dr. Ansari recommended surgery and opined that the rotator cuff tears were caused by claimant's work for respondent.

A second preliminary hearing was held on July 11, 2008. Claimant requested the shoulder surgery and he further requested that the surgery be performed by a physician other than Dr. Ansari. Claimant alleged that he did not have a good result from surgery Dr. Ansari had performed on his finger and he wanted a different physician to perform his shoulder surgeries.

At the second preliminary hearing the respondent argued that claimant sustained intervening injuries. Because claimant had left work for respondent and had worked for two subsequent employers the respondent argued that claimant had suffered the rotator cuff tears after his employment with respondent had ended.

As previously noted, the ALJ ordered respondent to provide the treatment recommended by Dr. Ansari. Implicit in that determination is a finding that claimant's injuries were caused by his employment with respondent. No appeal was requested from that determination. The ALJ also denied claimant's request to change treating physicians. The claimant appealed from that determination.

This Board Member agrees with the respondent and concludes, at this juncture of the proceeding, the Board does not have jurisdiction to review this preliminary hearing order.

The Board's jurisdiction to review preliminary hearing issues and findings is generally limited to the following:<sup>1</sup>

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<sup>1</sup> K.S.A. 44-534a.

- (1) Did the worker sustain an accidental injury?
- (2) Did the injury arise out of and in the course of employment?
- (3) Did the worker provide timely notice and timely written claim?
- (4) Is there any defense to the compensability of the claim?

Additionally, the Board may review any preliminary hearing order where a judge exceeds his or her jurisdiction.<sup>2</sup> Jurisdiction is generally defined as authority to make inquiry and decision regarding a particular matter. The jurisdiction and authority of a court to enter upon inquiry and make a decision is not limited to deciding a case rightly but includes the power to decide it wrongly. The test of jurisdiction is not a correct decision but the right to enter upon inquiry and make a decision. Jurisdiction is described in *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P2d 552, rev. denied 221 Kan. 757 (1977), as follows:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly. (Citations omitted.)

The Board has on other occasions determined that a request to change the authorized treating physician is the furnishing of medical treatment. The preliminary hearing statute found at K.S.A. 44-534a gives the ALJ authority to grant or deny the request for medical compensation pending a full hearing on the claim. Thus, the ALJ did not exceed her jurisdiction and the Board does not have jurisdiction to review the Judge's preliminary Order for Medical Treatment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>3</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>4</sup>

**WHEREFORE**, it is the finding of this Board Member that the claimant's appeal is dismissed and Administrative Law Judge Pamela J. Fuller's Order for Medical Treatment dated July 16, 2008, remains in full force and effect.

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<sup>2</sup> K.S.A. 44-551.

<sup>3</sup> K.S.A. 44-534a.

<sup>4</sup> K.S.A. 2007 Supp. 44-555c(k).

**IT IS SO ORDERED.**

Dated this 30th day of September 2008.

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HONORABLE DAVID A. SHUFELT  
BOARD MEMBER

c: Thomas R. Fields, Attorney for Claimant  
Shirla McQueen, Attorney for Respondent and its Insurance Carrier  
Pamela J. Fuller, Administrative Law Judge